NO. 84-738 (2)

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1984

HERBERT F. MOORE,
Petitioner,

v.

SARAH T. MORROW, INDIVIDUALLY AND AS SECRETARY OF N.C. DEPARTMENT OF HUMAN RESOURCES; THE N.C. DEPARTMENT OF HUMAN RESOURCES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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18

QUESTION PRESENTED

Were comments of the director of a state-supported institution, which characterized the Governor of the State of North Carolina as either ignorant or dishonest, protected by the First Amendment to the Constitution of the United States?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT

1) THE DISTRICT COURT'S GRANTING OF DEFENDANTS' MOTION FOR DIRECTED VERDICT WAS IN ACCORD WITH APPLICABLE LAW. THEREFORE, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT IS CORRECT, AND A WRIT OF CERTIORARI SHOULD NOT ISSUE 5

2) THE FEDERAL QUESTION HEREIN HAS PREVIOUSLY BEEN SPECIFICALLY DETERMINED BY THIS COURT 10

3) THE DECISION OF THE DISTRICT COURT WHICH WAS AFFIRMED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER . 10

4) THE DECISION OF THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT 12

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) 8, 11, 12

Cooper v. Johnson, 590 F. 2d 559 (4th Cir., 1979) 7

English v. Powell, 592 F. 2d 727 (4th Cir., 1979) . 12

Gieringer v. Center School District No. 58, 477 F. 2d 1164 (8th Cir. 1973) 11

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 7

Leonard v. City of Columbus, 705 F. 2d 1299 (11th Cir., 1983) 11

McKinley v. City of Eloy, 705 F. 2d 1110 (9th Cir. 1983) 11

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 5, 7, 8, 10, 11, 12

United States Civil Service Commission v. Letter Carriers, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973) 9

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STATEMENT OF THE CASE

On June 18, 1974 Herbert Moore, Petitioner herein, was hired by the North Carolina Department of Human Resources as Director of the North Carolina Alcoholic Rehabilitation Center in Black Mountain, North Carolina. At the time Moore was hired, he was hired as a "permanent employee," as opposed to a "temporary employee." Moore was employed at a time when the State Personnel Act in effect was undergoing considerable change and evolution. The State Personnel Act in effect at the time Moore was hired gave the State Personnel Board the power to hear appeals of applicants, employees, and former employees and to issue advisory opinions in appeal cases. No tenure system existed under North Carolina law at the time

Moore was hired. Therefore, at the time he was employed, Moore's employment was terminable at the will of the North Carolina Department of Human Resources.

In 1975, the North Carolina General Assembly amended the State Personnel Act, effective February 1, 1976, to provide that "permanent employees" were entitled to proceed through an appeal procedure to challenge disciplinary or dismissal actions, giving the State Personnel Commission the right of "investigation of complaints and the hearing of appeals of applicants, employees, and former employees and the issuing of such binding corrective orders or such other appropriate actions concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified." NCGS 126-4 (1976).

The North Carolina General Assembly provided in that same Act in 1975, effective February 1, 1976, that employes "that serve in policy-making positions, such positions to be designated by the Governor or by each elected Department Head in a letter to the State Personnel Director, The Speaker of the House of Representatives, and the President of the North Carolina Senate by May 1 of the year in which the oath of office is administered to each Governor" shall not have the right of appeal to the State Personnel Commission to challenge disciplinary or dismissal actions. NCGS 126-5 (1976).

James B. Hunt, Jr., was administered the oath of office as Governor of North Carolina on January 8, 1977. In a letter dated April 29, 1977, addressed to the State Personnel Director, The Speaker of the House of Representatives and the President of the North Carolina Senate, Governor James B. Hunt, Jr., designated 868 positions within the nine departments

under his control as policy-making positions. The Petitioner's position as Director of the North Carolina Alcoholic Rehabilitation Center in Black Mountain was one of those positions designated as policy-making.

In 1977, the North Carolina General Assembly further amended the State Personnel Act to provide that the right to a binding appeal before the State Personnel Commission on the question of dismissals shall not apply to "an employee of the State of North Carolina who has not been continuously employed by the State of North Carolina for the immediate five proceeding years. NCGS 126-5 (1977).

The changes in the State Personnel Act, and the enforcement of those laws by Governor Hunt resulted in a great deal of public debate. Moore, who was affected by the changes in the personnel laws, voiced his concern about the changes to his supervisors, including Sarah T. Morrow, Secretary of the Department of Human Resources under Governor Hunt. On one occasion, Moore wrote to Dr. Morrow expressing his concern. Moore was not fired for writing that letter. Later in the month of June, 1977, Moore voiced his concerns personally with Dr. Morrow at a meeting in Raleigh. He was informed by Dr. Morrow that she had discussed the policies with the Governor and that the decision of the Governor was final. Moore was not fired at this time.

On July 8, 1977, Moore held a press conference in the Activities Room of the Alcoholic Rehabilitation Center, during his regular working hours. The purpose of the press conference was to criticize the changes in the State Personnel laws and their enforcement by Governor Hunt. Prior to the press conference Moore told a newspaper reporter for publication: "I contend that he (Hunt) is either dishonest or ignorant. If what

he is doing is for political purposes, then I think it's dishonest. If he truly believes this is the way to improve the efficiency in state government, then I think it's ignorant."

Secretary Morrow read the newspaper accounts of Moore's press conference and his statements about Governor Hunt. About two weeks after the press conference, Secretary Morrow telephoned Moore and informed him that he was being terminated as Director of the Alcoholic Rehabilitation Center, effective July 31, 1977. Only July 24, 1977, Moore received a written notice of his termination. At trial, Secretary Morrow stated that Moore was terminated because of the statements he made about the Governor: "He had said that the Governor was either dishonest or ignorant, and when I read some of the things that had been stated, I realized that this man's loyalties and his attitude towards this administration would make it impossible for us to carry out a good relationship, and to carry out the programs and policies of the administration."

Moore brought this action against Dr. Sarah T. Morrow, Individually and as Secretary of the North Carolina Department of Human Resources, and James B. Hunt, Jr., Individually and as Governor of North Carolina, and the North Carolina Department of Human Resources. He alleged that these Defendants wrongfully dismissed him for exercising his First Amendment Right to Speech. Immediately before the trial of the action, Moore dismissed the action against Governor James B. Hunt, Jr.

The case was tried before a jury in Asheville, North Carolina on October 17, 1983. At the close of all the evidence, the District Court granted Defendants' motion for a directed verdict pursuant to F.R. Civil Procedure 50. Moore appealed the granting of that

motion and the District Court's dismissal of the action to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the District Court.

ARGUMENT

1) THE DISTRICT COURT'S GRANTING OF DEFENDANTS' MOTION FOR DIRECTED VERDICT IS IN ACCORD WITH APPLICABLE LAW. THEREFORE, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT IS CORRECT, AND A WRIT OF CERTIORARI SHOULD NOT ISSUE.

The leading case on discharge for exercise of First Amendment rights is *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). In *Pickering*, the Court applied a balancing test between the interests of the employee in commenting upon matters of public concern and the interests of the State in promoting the efficiency of public services it performs through its employees. Some of the variants the Court examined include the hierarchical proximity of the criticizing employee to the person or body criticized, the potential disruptive effect or harm caused by the statements, the degree of general public interest in the subject of the statements, whether the fact of the employee's position creates a presumption of greater access of facts related in the statements, and whether the statements are likely to impede the employee's proper performance of his daily duties. 391 U.S. 569-573.

The uncontroverted facts in this case are that, following his designation as an exempt employee,

petitioner called a press conference on July 8, 1977, as Director of the ARC, and publicly stated in a separate interview with the press that the Governor had abused the law in exempting positions at the ARC and that "I contend that he (Hunt) is either dishonest or ignorant. If what he is doing is for political purposes, then I think it's dishonest. If he truly believes this is the way to improve efficiency in State government, then I think it's ignorant." During the press conference, petitioner stated his views on the new tenure system for State employees, and was critical of this system. The press conference was called by petitioner during his working hours on the grounds of the ARC, a State-operated facility which treats alcoholics in need of custodial care.

The statements made by petitioner in the press conference and in separate interviews with the press were not related to the care and treatment of alcoholics.

As Director of the Western North Carolina ARC, Petitioner was charged with the day-to-day administration and supervision of the alcoholic rehabilitation program and detoxification unit for 35 counties of Western North Carolina. He supervised approximately 130 employees at the ARC.

The State of North Carolina provides funds to the Department of Human Resources for the treatment of alcoholics at regional rehabilitation centers.

During her tenure as Secretary of the Department of Human Resources, Respondent Sarah Morrow was responsible for the management of all of the ARC's in North Carolina, including the Western North Carolina ARC. Dr. Morrow was appointed to her position by former Governor Hunt, pursuant to his statutory authority. Dr. Morrow's link with the staff and patients at the ARC's was the director of each of these centers.

The relationship between Petitioner and Respondents was one which called for a significant degree of loyalty. While respondent Morrow and former Governor Hunt were by law ultimately responsible for the management of the ARC at the time in question, they depended on the director of the ARC to carry out their directives. Common sense dictates that Respondents should not have been forced to depend on an individual to carry out their directives who has publicly attacked their honesty and integrity.

The *Pickering* test also weighed the relationship between the employee's position and the subject matter of the speech. Petitioner's employment was central to the subject matter of his speech. Clearly, petitioner was not speaking as a mere member of the public, but as Director of the ARC and as an employee directly affected by the statutes he was criticizing.

Thus, while petitioner enjoyed the right to speak out on the issue of the tenure system, his freedom of speech was not absolute—he did not have the right to speak out on this issue anywhere at any time. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). In *Cooper v. Johnson*, 590 F. 2d 559 (4th Cir., 1979), the Fourth Circuit stated, "In all, the issue is whether he spoke out as an employee or as a member of the public." 590 F. 2d at 561.

Petitioner's evidence indicates that he spoke out as Director of a State facility, not as a member of the public. His statements were not made on his own time but on State time at a State facility. The comments were not related to his duties at the ARC, and yet he invited the press to the facility to hear his statements in spite of his obligation to strictly protect the identities of the patients at the ARC. Clearly petitioner's relationship with the targets of his speech was a working relationship for which personal loyalty and

confidence were necessary. The statements, under the circumstances, would and did tend to foment controversy and conflict at the ARC.

Thus, Petitioner spoke out at a place, time and under circumstances which clearly could interfere with the operation of the ARC. Therefore, the *Pickering* balance must be struck in favor of the State's interest in promoting "the efficiency of the public services it performs through its employees." 391 U.S. at 568.

A recent decision of the Supreme Court strongly supports the trial court's ruling. In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 75 L. Ed. 2d 708 (1983), the Court concluded that "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 75 L. Ed. 2d at 723.

The Supreme Court in *Connick* also closely examined the manner, time and place in which the questionnaire at issue was distributed. The Court concluded that "the fact that Myers, unlike Pickering, exercised her right to speech at the office supports Connick's fears that the functioning of his office was endangered." 75 L. Ed. 2d at 724. Here again the situation is parallel, since Petitioner Moore made his statements while he was on duty as Director of the ARC, and made the statements on the grounds of the ARC.

The final factor discussed by the Court was the context in which the dispute between Myers and Connick arose. "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the

speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." 75 L. Ed. 2d at 724. Moore's criticisms of the Governor concerned policies which directly affected his own employment, and for this reason, Respondents contend that their position is entitled to extra weight, as stated by the Supreme Court.

Respondent Morrow's testimony on her reasons for dismissing Moore is worth quoting again: "He had said that the Governor was either dishonest or ignorant, and when I read some of the things that had been stated, I realized that this man's loyalties and his attitude toward this administration would make it impossible for us to carry out a good relationship, and to carry out the programs and policies of the administration."

Moore simply went too far. He was allowed to disagree with the policies in writing, and he was allowed to voice his concerns directly to Morrow, without any form of retribution being taken against him. And, there may well have been circumstances under which he could have publicly voiced his concerns, in the proper manner and at the proper place, in a constitutionally protected fashion. This the Petitioner did not do. Instead, he said the wrong thing at the wrong time and in the wrong place. Therefore, as a matter of law, his statements are not entitled to First Amendment protection, and Respondents were entitled to a directed verdict on the First Amendment issue, as found by the District Court.

Plaintiff cites *United States Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973), as authority for his position. That case, however, dealt not with specific statements of a public employee, but with the rights of

public employees to engage in partisan political activities. The Court specifically quoted from *Pickering*, stating: "[T]he government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.'"

Thus, the decision of the District Court, which has been affirmed by the Court of Appeals, is consistent with prior holdings of this Court, and a writ of certiorari should not issue.

2) THE FEDERAL QUESTION HEREIN HAS PREVIOUSLY BEEN SPECIFICALLY DETERMINED BY THIS COURT.

As set out in this argument, *supra*, at Paragraph 1), the holding of the District Court, as affirmed by the Court of Appeals, is in accord with previous decisions of this Court on the federal questions before the Court. Therefore, a writ of certiorari should not issue.

3) THE DECISION OF THE DISTRICT COURT WHICH WAS AFFIRMED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER.

Petitioner cites three decisions from other circuits, as authority for his position that the decision of the District Court which was affirmed by the Court of Appeals for the Fourth Circuit, conflicts with decisions from other circuits on the same subject. Petitioner's

reliance on these cases is misplaced.

In *McKinley v. City of Eloy*, 705 F. 2d 1110, 1113 (9th Cir. 1983), the Ninth Circuit stated:

> "The initial question is whether the first amendment protected plaintiff against discharge for the type of speech in which he engaged."

The Court acknowledged that the question of which publications address issues of general or public interest is a question which must be decided on an ad hoc basis. The Court then applied the balancing test of *Pickering* and *Connick* and determined that the speech in question did address an issue of public concern.

In *Leonard v. City of Columbus*, 705 F. 2d 1299, 1303 (11th Cir. 1983), the Eleventh Circuit acknowledged that "Whether the conduct or speech is protected we determine by reference to the balancing test established by the Supreme Court in *Pickering*... [citation omitted]" Likewise, the Eighth Circuit, in *Gieringer v. Center School District No. 58*, 477 F. 2d 1164 (8th Cir. 1973), acknowledged that the question of whether speech is protected is the threshold inquiry and that the balancing test of *Pickering* must be applied by the Court in answering this question.

Thus, while the cases cited by Petitioner involve speech determined to be protected, unlike Petitioner's speech, that determination was made by applying the same test applied in Petitioner's case. Clearly the result in Petitioner's case was the correct and the common sense result—no employee, whether he is employed in the public or the private sector, should expect to be able to call his employer ignorant or dishonest in public with impunity.

Thus, the decision of the courts below is not in

conflict with the decisions of other circuits and a writ of certiorari should not issue.

4) THE DECISION OF THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT.

The District Court correctly determined that Petitioner was dismissed because he publically characterized the Governor of North Carolina, whose policies he was responsible for implementing, as being either ignorant or dishonest. Implicit in the opinion of the District Court is the rationale that under the balancing tests previously approved by this Court in *Pickering,* and recently affirmed in *Connick,* Petitioner's statements were outrageous statements which no employee should expect to make about his employer with impunity. The statements made by Petitioner were clearly, as the District Court stated, "bickering and running disputes" with his supervisors and were not issues of general or public concern. *English v. Powell,* 592 F. 2d 727 (4th Cir., 1979).

Therefore, while the evidence in the record on appeal supports the District Court's finding as to Petitioner's reasons for making his public statements, it is the nature of the statements and not the reason for making them that underlies the opinion of the District Court. Assuming that the District Court correctly determined that the statements were not entitled to protection as being "bickering and running disputes," as respondents contend, then clearly the decision of the Court of Appeals affirming that decision did not sanction a departure from accepted judicial proceedings. Therefore, the writ of certiorari should not issue.

CONCLUSION

For the reasons stated above, respondents assert that the petition for writ of certiorari should be denied.

Respectfully submitted this the 19th day of January, 1985.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT was served upon counsel of record for the Petitioner by depositing this day a copy thereof with the United States Postal Service, first class postage prepaid, addressed as follows:

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This 19th day of January, 1985.

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